IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

AARON JAMES and TIFFANY JAMES, Heirs and Proposed Prsonal Representatives of the Estate of Zane James, Plaintiffs, vs. CASEY DAVIES, and COTTONWOOD HEIGHTS, Defendants.	Case No. 2:19-CV-341 HCN

BEFORE THE HONORABLE HOWARD C. NIELSON, JR.

DATE: OCTOBER 15, 2019

REPORTER'S TRANSCRIPT OF PROCEEDINGS

ARGUMENT ON MOTIONS

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OCTOBER 15, 2019 SALT LAKE CITY, UTAH

P R O C E E D I N G S

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MR. SYKES: Judge, my clients are having trouble parking. They are on their way. They may come in a little bit late.

THE COURT: All right. Thank you for letting me know that. If it's all right, though, we will proceed.

MR. SYKES: Sure.

THE COURT: All right. Very good. We're here for a hearing on the motion to dismiss in the case of James vs. Davies, 19-CV-00341. Are we all in the right place except for your clients, I guess, who are on their way?

MR. SYKES: But they are on the way, yeah.

THE COURT: Very good. Let's have appearances, then.

MS. WHITE: Heather White for the defendants.

MR. SYKES: Robert Sykes for the plaintiff and responding parties.

THE COURT: Very good. Thank you. All right. I would like to wrap this up before noon, if that's all right. With that in mind, I anticipate approximately 30 minutes for each side. So, since

it's the defendants' motion, we will start with Ms. White, and then, if you would like to reserve some time for rebuttal, that would be fine.

MS. WHITE: Thank you, Your Honor. And please interrupt me if you have any questions that are -- at any time that you want. I have prepared remarks, but the most important thing for me is to make sure that I answer any questions that you have.

THE COURT: Well, I appreciate the invitation, but regardless, I probably would.

MS. WHITE: Excellent. So we are here on a motion to dismiss this Section 1983 civil rights claim that the Jameses have filed against Cottonwood City and officer Casey Davies. I appreciate counsel's excellent briefing on the matter because I think it's helped distill the issues down to some very narrow issues for the Court to resolve.

The first that is raised is the governing standard on a motion to dismiss, and they have raised the argument that it needs to be converted to a motion for summary judgment because there is extraneous information that is included in the briefing. And I just briefly wanted to point out, as we did in our reply, the two items that they focus in on. The first is the photograph of the gun, and the second is the

DA's report. The photograph of the gun was --

THE COURT: Before you spend too much time on this, do you wish me to rely on either the photograph or the content of the report?

MS. WHITE: No. And that --

THE COURT: Then I don't think you need to spend on any time on it.

MS. WHITE: Perfect. Thank you. I appreciate that. And the next thing that becomes very important is the standard that applies on the qualified immunity claims. Qualified immunity, as the Court is aware, applies only to the claims against Officer Davies and not the city. And the relevant inquiry there is, was there a constitutional violation and was that alleged violation based on clearly established law?

So, as we start talking about that, they can be taken, as the Supreme Court has directed, in either order. But I want to start on the constitutional violation because we believe there has neither been a constitutional violation alleged or clearly established law. So the law that applies to the Section 1983 cases, the seminal case is the Graham v. Connor case, and it established long ago that an officer's use of force is to be determined whether it

was objectively reasonable under the totality of the circumstances, all the facts and circumstances known to the officer at the time. And, because we're on a motion to dismiss, it's as pleaded in the Complaint.

We have the additional layer of Garner, and so that applies specifically to deadly force. And so when we look at that, it's whether the officer -- and we have to look at, under Graham, the officer's perspective based at the time, recognizing that officers are required to make these split second decisions in rapidly evolving circumstances.

THE COURT: Or perhaps, more accurately, not the officer but an objectively reasonable officer.

MS. WHITE: Right. That's correct. And so the officer -- adding Garner to the mix of the Graham determination, we look at whether the officer had probable cause to believe the suspect that he or she was pursuing posed a threat of serious physical harm to the officer or others.

And then, the second inquiry is whether deadly force was necessary to prevent the suspect's escape; and, third, whether the officer gave a warning, if feasible.

THE COURT: All right. Now, may I ask you about that? On the first prong, I'm not sure that's

exactly how Garner stated that prong. I think Garner essentially recognizes a presumption of danger or at least arguably recognizes a presumption of danger where there is an inherently felony -- inherently dangerous felony that has been committed.

MS. WHITE: That's correct. And that goes into the Ryder case as well.

THE COURT: Yeah. But, regardless of that, let's assume for current purposes that deadly force was justified under, you know, if we're looking at each of these three aspects of Garner. And I recognize that under Graham and subsequent cases, this is not necessarily an absolute test. These are maybe more like factors. But let's assume that, under the facts of this case, the first prong of Garner is satisfied, that because, you know, the suspect had committed armed robbery, or at least he was suspected of having committed armed robbery, that that part was satisfied.

Let's look at the other two factors, though, and I'm fairly troubled by both of them. Garner says where the deadly force -- it speaks to the deadly force being necessary to -- to prevent an escape.

MS. WHITE: Right.

THE COURT: And plaintiffs here allege that

Mr. James was badly injured from the motorcycle crash, that he was visibly limping and that Mr. Davies could have -- Officer Davies could have fairly easily caught up with him. And we will accept that for current purposes. I realize that you may -- may well dispute those facts, you know, if this were to move beyond the --

MS. WHITE: Certainly.

THE COURT: What's your best authority for the proposition that deadly force isn't necessarily only limited to cases where it's the only option for stopping, where it might not be strictly necessary in the sense that, you know, there might have been other means of stopping? You know, could you speak to that first for a minute?

MS. WHITE: Yes. So, I believe it's the Forrett vs. Richardson case talks about how you don't have to -- the officers don't have to wait until their lives are actually placed in danger or that they are shot at or those things. We have -- and I see where the Court's concern is, is that there have been allegations that he was limping away, that he was injured, and that the -- he didn't have a gun out, so was deadly force necessary?

And, under the clearly established case law,

both from the Tenth Circuit, the Supreme Court and the weight of other jurisdictions, we have a broad understanding that the suspects -- if someone is injured, they are still able -- limping in this case -- to pull out a weapon and shoot an officer. So, you know, children can do that. Elderly people can do that. It takes but a -- less than a split second for someone who is armed to be an actual lethal threat to the officer, justifying the officer's use of that deadly force.

THE COURT: So -- so what are your best cases from this body of law that you're referring to that hold that an officer can shoot someone to prevent his escape, even if they might be able to -- or fairly -- not just might, probably could just catch up to them and subdue them through other means?

MS. WHITE: The Forrett vs. Richardson case --

THE COURT: Okay.

MS. WHITE: -- is a good example. And in that case, the Court ruled that the use of deadly force to capture a suspect was objectively reasonable, even if the capture was inevitable. And if I can go down to the language of that --

THE COURT: Well, what is the citation for

that as well?

MS. WHITE: You bet. It is 112 F.3d 416, Ninth Circuit, 1997.

THE COURT: All right. Thank you.

MS. WHITE: And there are other cases that we've cited. I think both in our brief and in our reply I think there's some Tenth Circuit -- and I'm just missing the names of the cases, but I'm sure that they are cited in there, that stand for the same proposition, that just because a suspect may eventually be caught does not preclude the officer's use of deathly force because there is an immediate need to stop the danger to the community.

And here, the facts that were pleaded in the Complaint sufficiently allege that that was a problem. When we look to really the operative facts of the Complaint, they are distilled down to a few paragraphs. At paragraph 20, they acknowledge at about 6:00 a.m. James had just robbed a store in Sandy with an air soft gun. At paragraph 22, they establish James fled from the scene on a motor bike, which establishes that first prong that we talked about.

Then, the next is found at paragraph 52. Officer Davies heard dispatch announce the robbery. Then paragraph 55. Hearing dispatch, Officer Davies

decided to join the pursuit. At paragraphs 23 and 24, and here's where it gets into that they allege that he crashed his motor bike during the pursuit on a narrow neighborhood street -- and this was at around 6:10 in the morning, as earlier alleged in the Complaint -- and that at paragraph 60 B, Officer Davies shot James as he is running away.

So those are really the operative facts that we are dealing with. And it's important to understand that --

THE COURT: Before you get to that point, there's some reference in the argument to an armed robbery the night before and the report that James matched the description of the suspect from that previous robbery. Is that properly part of these allegations, or are we limited to the armed robbery that occurred that morning?

MS. WHITE: If I recall the allegations of the Complaint correctly, I'm not sure they referenced the -- specifically the robbery the night before. I think that's in the DA's report, which is referenced in the Complaint, so, technically, the Court has discretion to consider that, but I don't think it's necessary for the Court to use that. I think the immediacy of the robbery that just took place at 6:00

o'clock a.m., just minutes before this pursuit of Mr. James ensued, is enough to establish that the officers had probable cause to believe that he was a danger to -- a lethal threat to others and could pursue and use deadly force to prevent his escape.

THE COURT: All right. Let me ask you also, we talked a little bit about the second Garner prong, about knowing whether in fact the deadly force was necessary to prevent an escape. What about lack of a warning here? Again, I find that somewhat troubling.

MS. WHITE: And the case law is fairly clear. If you look to the Ridgeway case that we've cited in -- on pages 11 and 12 of our opening memorandum --

THE COURT: Is that the District Court decision from New Jersey?

MS. WHITE: New Jersey, yes. They presume that notice of deadly force is presumed by flight. There are other cases as well, that -- and the Forrett case may be one additionally. They focus in on the fact that the notice that is required is that the person understand that they are being pursued by an officer and that they are required to stop. And once that is in place, once there is that understanding, then that is the warning. It's not a stop-or-I'll-shoot warning that is required. It's the

warning that they are being detained by the police.

THE COURT: They are being pursued?

MS. WHITE: They are being pursued, exactly. And so here, the allegations of the Complaint are sufficient to establish that because he -- he had -- was being pursued by these officers. He was running from them. There are no allegations to the contrary, that he -- he was trying to get away from the police.

THE COURT: All right. So if -- if it's the case that the second prong of Garner doesn't really require that the deadly force be necessary, and the third prong doesn't really require a warning in the case where there's active pursuit, how much is left of Garner? I mean, Garner essentially rejected the common law rule that, you know, you could shoot at a fleeing felon, the fleeing felon rule. Has it really just come down to the fact that that rule is too broad in covering all felonies, as opposed to inherently dangerous felonies?

MS. WHITE: No. In fact, one of the cases that we cite talks about how it's a different situation where someone maybe has robbed a home at night and burgled a home, hasn't threatened any person and is running away and has no reason to believe. And so it distinguishes the situation between this armed

robbery, where there's threat and harm potential to people, as opposed to where there has not been the violence that -- or threat of violence that has occurred.

THE COURT: Well, that's what I'm asking. Is that really all that Garner stands for then is just that the fleeing felon rule is limited to inherently violent felonies and in Garner the Court didn't believe that a nighttime burglary was such?

MS. WHITE: I think under -- and perhaps that goes to one of the questions, and the qualified immunity standard that the Court --

THE COURT: We're on prong one here. We're talking about the constitutional violation still.

MS. WHITE: Right. But the qualified immunity prong -- qualified immunity applies to that first prong, too, is that whether there was a constitutional violation, did the officer -- could the officer have understood that his or her conduct was, beyond debate, plainly incompetent or knowingly violated the law.

THE COURT: Well, that goes to the second prong of whether there's qualified immunity, correct? That doesn't go to the issue of whether there was a constitutional violation. And the violation doesn't

come --

MS. WHITE: I see what you're saying.

THE COURT: -- unless there is subjective knowledge or intent. It depends on whether the force was objectively reasonable.

MS. WHITE: Yes. I see what you're saying, and I do agree with you that there is that distinction. So, you know, I -- the way that the cases have interpreted Garner is it's very fact specific. I think Garner is still the preeminent use of force case, and I don't think it's been gutted, I think it's just been interpreted many times over and is applicable and is applicable law, and maybe I'm not answering your question or understanding it.

THE COURT: No. No. That's fine. Let me ask it a different way. Leaving aside the qualified immunity for a moment and just talking about the constitution.

MS. WHITE: Okay.

THE COURT: Is it your position that an officer can shoot a fleeing individual who has committed a violent -- an inherently violent felony, period?

MS. WHITE: If the officer -- yes. If the officer has probable cause to determine that is the

case and that not using deadly force to prevent escape could -- could present that danger to others. I think that's what Garner stands for.

THE COURT: All right. And then, on that second part, the qualification you added that the officer could reasonably think that there was a danger, is it your position that that is satisfied any time that there has been an inherently violent felony committed and the individual is fleeing?

MS. WHITE: No. I think there has to be a factual determination as to what the situation was that confronted the officer in that moment. So, I don't think it's a broad rule that can apply across the board and that it makes anything okay. I think the case law is very clear because some cases come down on one side and some cases come down on the other.

THE COURT: All right. Are you aware of any case that finds a constitutional violation where the police have shot someone who is fleeing after committing an inherently violent felony?

MS. WHITE: No. And I don't think the plaintiffs have met that burden that they have on the qualified immunity --

THE COURT: Well, I was just asking --

MS. WHITE: -- either to present that.

THE COURT REPORTER: Please stop talking when the Judge is talking.

MS. WHITE: Oh. I apologize.

THE COURT: I was asking that question because you said the cases come down on both sides, and I was just wondering whether that really is true.

MS. WHITE: What I -- what I -- I didn't choose my language very carefully, and I apologize. The cases analyze the facts of deadly force very specifically. I am not aware of a case and have not found one in our briefing and in searching, that shooting a fleeing felon under circumstances similar to this one, where there has been a violent crime that has been recently committed, has -- where they have concluded the officer was not justified in using deadly force.

THE COURT: All right. Thank you.

MS. WHITE: You know, and I -- and backing up just briefly to your question about the necessity of deadly force, I think the Ridgeway case makes a very good point, and if I can quote from that case, the Court says: In the cool aftermath, it is deceptively easy to say, "What harm can come from giving a warning?" In the split-second reality of a deadly

police chase, that warning, whether verbal or a shot in the air, might permit the suspect to turn and fire a weapon or otherwise facilitate his escape, putting at risk innocent police and civilians who he encounters in the path of his flight.

And so any -- that goes to the -- both the necessity of using deadly force to escape, because it talks about possible danger to others and the officer and then the -- whether giving a warning beyond the knowledge that the person is being pursued will actually have the intended effect of getting someone to stop.

And I think the Courts have come down that it does not. And they point out, you know, that injured people can and have shot people and killed and injured officers. And there's no dispute that he had, and it was reported that he had robbed a gun with a store (as spoken) and threatened those individuals with that gun and could, at any moment, whether he was limping or not, whether he had fallen to the ground or not, can still be a lethal force to the -- a lethal threat, excuse me, to the officer.

Say, for example, hypothetically, that he fell and the officers, under plaintiffs' theories in the Complaint, not the facts alleged, could have

chased him down or tasered him. There is nothing that prevents him, on the ground, you know, injured on the ground, from pulling out that weapon and shooting the officers as they approach. So, it's -- it's -- that's the split second decisions and the deadly encounters that the Supreme Court is talking about when -- that these officers face on a daily basis, and it's formed really the genesis of the broad allowance that the Courts give to officers in these circumstances.

As for the fact -- as for -- there are additional problems that are posed, and that is allowing him to escape into this neighborhood pose problems such as he could have escaped into a home and barricaded himself or taken someone hostage. There's the possibility of stray gunfire. He had a gun, and it can go into neighboring homes and hurt or kill people in the neighbors.

And so, based on that information and the training that's provided and the circumstances as they presented themselves to Officer Davies at the time, it was reasonable for him to weigh all of those things and to weigh the relative culpability, too, of protecting the innocent people versus the person who is fleeing from an inherently violent felony.

And it's important to remember aspects about

the neighborhood as well can additionally add to an ability of a suspect to escape from the officer if not stopped with the deadly force. There are fences and homes and structures such as -- structures in which to hide, such as garages, out buildings, sheds, which could further enable him to hide or escape, and those very same -- those very same structures also apply to danger against the officers. They can -- those barriers, those fences, those structures in which they can hide also can permit the suspect to ambush an officer, to hide in there if the officer continues to pursue, you know, someone once they haven't been seen anymore, which they would do, they could be shot and injured or killed.

So the need to stop him and the need to immediately do so is very clear to this officer under the circumstances. And I don't think that there's anything that has been pleaded in the Complaint that is contrary to that, so I think that addresses the constitutional violation portion. And unless the Court has further questions on that, I wanted to move to the clearly established law.

THE COURT: No. You can proceed.

MS. WHITE: Okay. So, as the Court is aware, that as soon as the qualified immunity defense is

raised by a defendant, the burden then shifts to the plaintiff to come forward with clearly established law from either the Supreme Court, the governing jurisdiction, which here is the Tenth Circuit Court of Appeals, or the great weight of other jurisdictions that shows that the officer -- the officer's conduct was -- and I believe the words used in the White vs. Pauly case was "beyond debate." And going back to the Malley vs. Briggs case, "plainly incompetent or knowingly violates the law."

And if you think about that standard, that is a very high threshold to meet. It must be -- also be fairly fact specific to the officer's conduct so that the officer -- you can say that the officer was put on notice that his or her conduct violated the law. And the plaintiff spent some time talking about how it doesn't have to be an identical case, and that is true. It doesn't.

But in the recent years, we've seen the Supreme Court in the Mullenix case, in the White v. Pauly case, and case's before that -- White v. Pauly was just two years ago -- have really broadened the scope of this clearly established law so that -- because there have been a lot of circuits that have concluded that the generality set forth in Garner and

Graham are all that are needed.

And they have continually reminded the Circuit Courts that those general propositions are not sufficient to put officers on notice of what conduct is acceptable and what conduct is not and that there has to be -- that the -- to be clearly established factual scenarios that closely follow what -- the factual scenarios in this case.

And the plaintiffs have not cited a single case in which that has occurred. They -- and that alone is a basis for granting the motion for summary judgment -- or excuse me -- the motion to dismiss.

We have cited several cases in our briefing from other jurisdictions that have shown that Officer Davies' conduct was consistent with clearly established law, and while they are from other jurisdictions, we couldn't find the very factual pattern or scenario in the Tenth Circuit which, alone, is enough to grant the motion based on qualified immunity.

But when you even look outside for persuasive authority and you look to the Jones, the Clark and the Forrett cases, which are all cited in our briefing, they establish factual scenarios that are consistent and similar to that in this case. So, it is our

position that the plaintiffs have failed to meet that clearly established burden.

If that is the basis for the Court's ruling, then the Court would then need to additionally address the claims against the city, and that goes back to the standard that I talked about initially. If there is found to be no constitutional violation, that is not the case because, where there is no constitutional violation, there can be no municipal liability.

THE COURT: Right. I understand the relationship of these issues.

MS. WHITE: And then -- so, on the Monell claims, they are called Monell claims after the case that established that. They require that any liability must be predicated on wrongful conduct by the city itself and not its employees. And to do so they have to prove two things, that there was a policy, pattern or practice that was the moving -- the second is the moving force.

THE COURT: Right. Now, you can spend time on this if you want, but my understanding is your position is essentially that the allegations are just inadequate to establish the Monell claim. Is that not correct?

MS. WHITE: That is correct. And if you look

specifically to paragraphs 140 to 143 of the Complaint, that is where you'll see the allegations against the city. And based on all of the case law and the arguments that we have made in our briefing, they do not establish a policy, pattern or practice. They are simply allegations and not factually supported, and I don't want to belabor the point if the Court doesn't have any questions about or concerns about that.

THE COURT: Let me ask you just quickly, back to your qualified immunity argument. You cited James and Clark. Do those cases -- do either or both of those involve cases where there was no warning given or where the force wasn't strictly necessary?

MS. WHITE: If I recall correctly -- let me just see.

THE COURT: Let me rephrase that. The force may not have been strictly necessary.

MS. WHITE: So in the Forrett case, this is what --

THE COURT: We have discussed that. James and Clark were the other two you mentioned.

MS. WHITE: Excuse me. Sorry. I've got Carter right here, and I'm not pulling up Clark really quickly, and I apologize. Let me see if I can pull

that up. So the Clark case granted qualified immunity to an officer who shot a suspect fleeing a violent crime, even though there were other non-deadly alternatives. As for the warning question, I cannot remember specifically, in that case, whether a warning was given or not.

THE COURT: All right.

MS. WHITE: And then the other case was the Jones case that you asked about; is that correct?

THE COURT: Right. I think those were the three you mentioned. In your talking about qualified immunity, you talked about Forrett, Jones and Clark, I think.

MS. WHITE: And the same applies. I'm not sure specifically if a warning was given in the Jones case, but in that case there was a finding of qualified immunity for an officer who shot a fleeing suspect from an armed robbery that was carried out with a BB gun that was used to trick others into thinking it was a real gun.

THE COURT: And that's the Fourth Circuit, correct?

MS. WHITE: It is. It's the Fourth Circuit. And I'm just scrolling through briefly to see if I can find whether there was a warning, but I don't want to

waste the Court's time with this.

THE COURT: All right. Well, I can look as well.

MS. WHITE: Okay.

THE COURT: But thank you. Do you have any other points you would like to make or --

MS. WHITE: Do you have any questions on the Monell and the pleading standard for the claims against the city?

THE COURT: I do not, no.

MS. WHITE: Okay. Then the only remaining is the state constitutional claims, and the same as the Court is aware from the Kashinsky case that was just decided by the Utah Supreme Court. The same standard applies in determining whether there was flagrant -- a flagrant violation of the law and so I don't want to belabor those arguments.

THE COURT: All right. No. I understand.

MS. WHITE: It's the same as clearly established. The last point is that the plaintiffs did not respond to the common law claims and so that we are immune from those claims. And then the provisional claims, the Statute of Limitations is expired on those. And so, to the extent that those have or could be asserted, should be dismissed as a

matter of law as.

THE COURT: All right. Thank you.

MS. WHITE: Thank you, Your Honor.

THE COURT: All right. Mr. Sykes?

MR. SYKES: Your Honor, how much time did you want me to take? I know you want to be out of here by noon.

THE COURT: You can have as much as your opposing counsel had, if you need it. I want to keep it balanced in terms of time, and we went just a little bit longer.

MR. SYKES: All right. I apologize. I'm getting over a cold still, so I might have a little hacking here. Excuse me. Judge, I would like to first talk about the facts of the case because I think the facts are going to determine the outcome here. Excuse me just one second. I need some water.

One thing I've seen as I've read dozens of cases -- and we do a lot of civil rights in the office and so we get a lot of cases with Ms. white, actually, believe it or not. But we get a lot of cases involving shootings and the like. It happens frequently. So, I've had a chance over the years to read most of these cases that have been cited in the briefs, and here's what I take away from all of that.

The timing of the use of force is critical. Okay? The timing of the use of force is critical in these cases. It's like the Rodney King case, where he leads deputies and police officers on a wild chase through L.A. County, putting dozens of lives at risk, a horribly irresponsible thing, crashes his car, he's out in the field, and an officer goes out there when he's now, you know, outside of his car, which was his weapon, and bangs him over the head and gives him a brain injury.

It was held to be improper, obviously, and so the timing of the force is important. And here's what I see in this case. And, again, there's been no discovery done, but Zane James crashes his bike in the street, okay? Officer Betenson claims to have seen that. We don't know whether or not Officer Casey saw that or not, because he raised his Fifth Amendment right not to give a statement to his own department or to investigators when he shot somebody dead.

So we don't know what his position is going to be on that, but I think there -- just the inference from these facts that are admitted in a motion to dismiss is that maybe he did see that. Okay? Anyway, the bike is, I don't know, 40 feet away on the pavement from where he was shot in the front yard.

Now, he's limping away. That's been alleged. Undisputed. There were many officer's on the way, there are sirens, okay, going off. The witness that we have that saw this whole thing from her front yard -- we recount in paragraph 60 of the Complaint -- said it's what woke her up. She's out there and she sees the whole thing from 40 or 50 feet away. Okay? There's no one else around. Okay? And there are people in their homes, undoubtedly, but there's no one else around. That's an important thing. His hands are visible.

Now, they imply -- and they want you to weigh these facts on the motion to dismiss -- they imply that he was going for his gun, maybe his hand was near his waist or something like that, but our witness says no.

THE COURT: Right. And I understand the rules that apply to a motion to dismiss.

MR. SYKES: Sure.

THE COURT: I'll take your allegations as they are made.

MR. SYKES: No weapon is visible. Okay? After they shot him and paralyzed him, they found it tucked in his clothing somewhere. A BB gun is what they found. Now, there are no hostile motions by

Zane. None. There are no threats uttered by Zane against officers. There are no sudden movements by Zane. Okay? There is no warning, "Stop or I'll shoot." Okay? And he was never told he was under arrest. Now, those are facts which pop up in all of these cases in one form or another. They just pop up. Okay.

And here's -- this is Weinstein vs. McClone. I think it's a very good case, a Seventh Circuit case, but the cite is 787 F3d 444, 2015. 787 F3d 444, 2015. But they talk about the Graham factors.

And here's what they say on page -- if I can find it -- excuse me one second here. I'll find it in a minute. But here's what they say after citing the Graham factors: In other words, a person has a right not to be seized through the use of deadly force unless he puts another person, including a police officer, in imminent danger or he is actively resisting arrest and the circumstances warrant that degree of force. As applied to the present case, this means that Jerome -- that was the man shot -- has a constitutional right not to be shot on sight if he did not put anyone else in imminent danger or attempt to resist arrest for a serious crime.

Now --

THE COURT: What were the facts of Weinstein?

MR. SYKES: The facts were -- it was domestic disturbance. Give me half a second. I think his wife Susan called 911, November of '07, told dispatch that her husband was in the garage, he was threatening to kill himself and he had access to a long gun. Okay? Susan did not know if he had any ammunition. The disptacher relayed all the information to Deputy McClone. Ms. Weinstein -- Weinmann vs. McClone. McClone shows up, decides to force entry into the garage. He peered in, deduced that Jerome was in the southwest corner of the structure -- it was the only area not visible -- knocked on the door of the garage. No response. Forced entry. At that point, Jerome was sitting in a lawn chair with a shotgun across his lap resting on the arm rests or just above them.

THE COURT: All right. I recall that now. Thank you.

MR. SYKES: And so, you know, my point is that time and place makes a huge differences. Now, if you go to Tennessee vs. Garner, cited by both parties -- excuse me. I think this principle -- and, by the way, Tennessee vs. Garner has been cited thousands of times by -- in many different contexts. But I think it's important to look at the facts. I

mean, the kid was shot. He committed a burglary. Tennessee defended it by saying, well, burglars are dangerous, and he could have had a weapon, kind of thing, you know.

THE COURT: Right. No --

MR. SYKES: You're aware of the --

THE COURT: I am well aware of the facts.

MR. SYKES: The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. And all due respect to my esteemed colleague, Ms. White, that's what she's arguing.

THE COURT: Now, let me -- let me --

MR. SYKES: In a nut shell, she's arguing that.

THE COURT: Now let me ask you a couple of questions.

MR. SYKES: Sure.

THE COURT: I think, when you line this case up with Garner, you know, obviously there's a difference in the crime, but Garner gives, as an example of when deadly force might be appropriate, I guess it has three things it says. It says, first of all, when there's a danger posed to the officer or when an inherently violent felony has been committed;

second, when it's necessary to prevent escape; and, third, you know, when a warning, if feasible, has been given.

It gives that as an example of when it might be appropriate. And, as I said to your opposing counsel, I -- you know, as a constitutional matter under Garner, I'm quite troubled by the absence of a warning here, and I'm quite troubled by the -- you know, the issue of whether it was really necessary. That said, though, I have a question for you.

MR. SYKES: Sure.

THE COURT: Which is, are you aware of any case where a Court has found a constitutional violation when someone has committed an inherently violent felony, when the officer could have reasonably believed that they were armed and when they were fleeing from the police?

MR. SYKES: You know, some of the cases that we cited in our briefing I think approach that. It's a very good question. And, you know, I think it would be helpful at some point, if you are okay with it, to give us time to look at that specifically as you phrased it. But, you know, I think that the cases that we -- I mean -- and on page 11 of document 16 of our briefing we talk about the King case, the domestic

disturbance. He's on the porch.

THE COURT: That's different in at least a couple of respects.

MR. SYKES: He wasn't fleeing.

THE COURT: He wasn't fleeing, and it wasn't an inherently violent felony.

MR. SYKES: No. That's true. And I'm not sure, by the way -- I know this may sound odd, but it was an armed robbery, but there was no violence committed. I mean, if the facts had been different, you know, if he had shot people or shot the gun, even, you know, that's different. I know that using a gun is obviously a potentially violent felony, but the facts were that he didn't commit violence. He committed a violent felony perhaps, but no violence, if that makes sense.

THE COURT: All right. No. I understand your point, but I think that might be a bit of an uphill battle for you.

MR. SYKES: It may be an uphill battle, but -- but he didn't do any harm with his BB gun.

THE COURT: Right. I understand that.

MR. SYKES: And so, those facts are -- are I think important. Now, let's see. I did cite also -- you know, as far as having the exact facts, I don't

recall one where --

THE COURT: Well, I don't need the exact facts, I just need those three facts.

MR. SYKES: That he left, that he -- one where they left the scene, I -- Zuchel vs. Spinharney, disturbance at a restaurant. Kid pulled out a nail clippers, told the officers it was a knife. She got shot four times.

THE COURT: Again, it doesn't look as though he was fleeing, and it's not clear that there was an inherently violent felony.

MR. SYKES: Yeah. Well, you know, Estate of Lopez vs. Gelhaus, Ninth Circuit case. Toy gun resembling an AK47.

THE COURT: Again, not fleeing, no inherently violent --

MR. SYKES: Yeah. No violent felony. I, you know, at this point, as I stand here, Judge, I can't give you a case exactly like that.

THE COURT: Right. And --

MR. SYKES: And I don't think it's required under these rules, but it's a great question.

THE COURT: No. I --

MR. SYKES: It's a great question.

THE COURT: No. I understand, you know, we

certainly have cases that, you know, like I guess the hitching post case is the classic example where the Court finds that the violation is clear enough, but as your co-counsel said, the Supreme Court has made clear, or at least it's indicated on a number of occasions recently, that it doesn't view Garner and Graham as being clear enough, absent a really easy case. And so, you know, if this were a case like Garner itself, where there was, you know, not an inherently violent felony, or at least that's what the Court concluded in Garner, that might be one thing.

But I'm having a little bit of -- just like I'm having trouble accepting, you know, the constitutional argument made by your opposing counsel, I'm having a little bit of trouble on your side finding how you get past qualified immunity on the second prong if there is -- if it is in fact the case.

MR. SYKES: The second prong meaning?

THE COURT: The clearly established law.

MR. SYKES: Well, Judge, we -- you know, and you have the black robe and I don't, but I think Tennessee vs. Garner -- I mean, I read you the one quote.

THE COURT: Right.

MR. SYKES: But, you know, while the suspect

poses no immediate threat to the officer and no threat to others, the harm resulting from trying to apprehend him does not justify the use of deadly force to do so. He was fleeing. And Tennessee said it was a violent crime.

THE COURT: Right.

MR. SYKES: You know. I mean, you can differ on that. The Supreme Court kind of poo-poo'd that. It's just a burglary, but, you know, a lot of burglaries end up in death because people get shot. I mean, you know, a lot of burglars are shot in Utah by people defending their homes under the Second Amendment. It is no doubt -- it is no doubt unfortunate, when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing a suspect. A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead.

THE COURT: Yeah.

MR. SYKES: I don't know how that could be anymore clear. You know, this young man, Zane, age 20, I think, maybe 19. His parents can probably tell me. You know, as far as that officer -- he had nothing in his hands. He's limping away from the scene of a crashed motor bike, you know. And putting

his name in, officer, the defendant, may not seize Zane, who's unarmed. He doesn't have any arms -- maybe something tucked away, but he doesn't have anything in his hands. And, at that point, he's non-dangerous. He can't shoot him dead, see?

It is not, however, unconstitutional on its face, where the officer has probable cause to believe that the suspect poses a threat of serious physical harm.

Now there's a comma there. I think that's a question of fact that needs to be fleshed out in discovery. You know, I'd like to get this guy under oath. I don't know that he can raise his Fifth Amendment right anymore, okay? And I know a jury wouldn't take very kindly to it, if it gets to a jury trial. So I think he needs to explain what he was thinking to see if he's a reasonable officer or not. We don't know that.

THE COURT: And particularly about whether he really thought there was a danger.

MR. SYKES: Yeah. And to believe that the suspect poses a threat of physical harm either to the officer or to others. It is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a

weapon -- did not happen. Okay -- or there is probable cause to believe he has committed a crime involving the infliction or threatened infliction of serious physical harm. Now, I think that's up in the air.

I think a jury should hear that under the cir -- we haven't interviewed those people that were in the store that day, you know. He did pull out a BB gun. No question, you know, but I think they should be subjected to a deposition. Deadly force may be used if necessary to prevent escape and if, where feasible, some warning has been given. There was clearly an opportunity to give a warning. Okay?

Let's suppose he had a gun. In some of the cases I've read, they have a weapon, like the guy who had a shotgun on the porch. Give him a warning. Put that weapon down or I'll shoot or I'll tase you.

THE COURT: Right. So under Garner, you would say, on the first part of that, that it's a factual question whether there was a danger or whether the armed robbery really involved a threat of violence.

MR. SYKES: Yeah. Under the circumstances. Don't forget, you know, Judge, if we're there at the store -- let's suppose you're there at the store.

You're an off-duty officer, and you see this. Those facts might be different. You don't know if he's going to shoot or not. Maybe at that point, you know, he's got a weapon in his hand. You don't know if it's a BB gun. It was. But, you know, maybe that's different. But here we're talking about, you know, ten minutes, seven or eight, ten minutes later, you know, and he's injured and he's limping off, and he's got his back to you. You can see his hands and he's got no weapon.

THE COURT: Right. So under the first prong you'd say that there is a factual issue as to whether he presented any threat or whether he committed --

MR. SYKES: Yeah.

THE COURT: -- a crime involving a threat of course. You'd say on the second part that it wasn't necessary to prevent escape and, on the third part you'd say that no warning was given, but it should -- that it could and should have been. Is that essentially what your position is?

MR. SYKES: Exactly. And arguably I think we fit under Garner. Now -- and let me just say this. I know time is a wasting here, and there are a lot of other cases that have come our way since Garner, and with apologies to my good friend Jim McConkie who is

in the audience here, I'm going to quote a case that he lost called Clark vs. Boca, 2017. Tenth Circuit case, reported case.

They discuss all of these issues. The young man had relieved himself on the side of the road. Officers had to pull him over. He takes off. He gets into, I think, a cul-de-sac or something. The officer blocks his exit with a car and gets out of the car. And, unfortunately, the young man was driving toward him with his car. He got within inches. Okay. Now, those are the facts that the Court relied upon.

And then they cite The Estate of Larsen. Okay? And they cite the -- the case of Sevier City vs. Lawrence, Lawrence, Kansas, 60 F3d 695. I think that's cited in the briefing. But here's what they say, citing Sevier, which was an older case. It's a 90's case. Here's what they say. They quote it:

The reasonableness of an officer's actions depends both on whether the officers were in danger at the precise moment -- that's the language they use -- at the precise moment that they used force and on whether the officer's own reckless deliberate conduct during the seizure unreasonably created the need to use such force.

Well, we don't have that, necessarily, but we

do have, at the precise moment.

And then it cites the estate of Larsen Factors, 2008 case. Now, I don't think the Tenth Circuit can modify Garner, but it can certainly do an exposition on its principles, and here's what it said, which I think is very relevant to our -- to your decision here today and whether to grant, in essence, a summary judgment.

It says: In assessing the degree of threat the suspect poses to the officer, we consider factors that include but are not limited to, one, whether the officers ordered the suspect to drop his weapon and the suspect's compliance with police commands; semicolon.

That's crucial here. And I don't even think they are claiming that he did. The witness -- our witness says he didn't, you know.

Two, whether any hostile motions were made with the weapon toward the officers.

No hostile motions. He's limping off, significantly injured.

Three, the distance separating the officers and the suspect.

Well, you know, 30 to 40 feet here, I think.

And, four, the manifest intentions of the

suspect.

Well, you see nothing from his intentions, as shown by his actions, to harm anybody. And so, in closing, I would say that there is -- what my esteemed colleague -- I have a great deal of respect for Heather White, by the way. What she's asking you to do is to weigh the evidence prematurely. She's saying, Judge Nielson, weigh the evidence in favor of my client and find qualified immunity.

And I'm saying you don't have to do that. Give us some time to do discovery. She can reopen all this under a summary judgment motion if she can prove it. I don't think she can. And I'm saying defer ruling on the facts. Deny this -- this motion. Let us do some discovery. Let us take the deposition of this officer who claimed the Fifth Amendment.

I've been doing this for a long time, okay, these kind of cases for a long, long time, okay, and I have never had a case -- and I'm sure there are others out there maybe -- I have never had a case where the officer who has injured somebody has taken the Fifth Amendment. This is the first time in my career that I've had one. Now, I think that this officer needs to be exposed to the greatest engine of truth in American law as my -- Ken Star said on TV the other night, and

that is cross examination. Okay? He's not the first that said it, by the way.

THE COURT: No.

MR. SYKES: But he said it last -- a few nights ago. Cross examination. Let's expose this case to the cross examination and the search light of truth here and find out what really happened, and that's all I ask you to do. Thank you very much.

THE COURT: All right. Thank you.

Ms. White, do you have any rebuttal remarks you'd like to make?

MS. WHITE: Yes. Just very quickly, three quick points, Your Honor.

MR. SYKES: I thought she used her 30 minutes up.

THE COURT: I'll give her just a couple, and if you have any strong objections to what she says, I'll give you another couple as well.

MR. SYKES: Thank you. Thank you, Judge.

MS. WHITE: The first is that we are not asking the Court to weigh facts. We have approached the briefing and the argument assuming everything pleaded in plaintiff's Complaint is true, and so it's our argument that, taking the four corners of that Complaint and applying it to the law is insufficient

under the law. So that's the first point that I wanted to just clarify and ensure that the Court understands.

THE COURT: Yes. Thank you.

MS. WHITE: And the second goes -- and the second two points goes to -- go to questions that you asked me about cases on warning and on necessity of stopping. I wanted to just point out the language in the Forrett case on the question you had about the necessity. And it goes to whether the deadly force is necessary or not. And at paragraph 6 of that opinion, which was on page 420, it states, quote: Even if Forrett's capture was inevitable, it does not follow on these facts that the use of deadly force was unnecessary. The Fourth Amendment does not require law enforcement officers to exhaust every alternative before using justifiable deadly force.

And I think that goes to some of the things that Mr. Sykes was arguing and the feasibility of that -- of the -- excuse me, not the feasibility of the warning, but the necessity of stopping in conjunction with all of the other factors we argued with the location and escape and hostages and other people.

The second point, I wanted to point the Court

to the Ridgeway case, and it talks about feasibility of a warning, and in that case the Court really focused on paragraph 10 of that opinion. It says -- it focuses in on whether the suspect is aware that the police are trying to apprehend him. And in that same paragraph, it talks about the fact that there were police cars with lights and sirens and there was continued flight, and that -- that that is sufficient, that continued flight is sufficient to put a fleeing suspect on notice that the -- and here's the quotation, quote: That the use of deadly force by the police to capture him, end quote, would occur.

And so that's the cases. I talked about the fact that it's implied if they know the police are pursuing them and not stopping, that that is a possibility. That is the warning that is the feasibility and that is talked about in Garner, not the words "stop or I'll shoot".

THE COURT: All right. Thank you.

MS. WHITE: Thank you.

THE COURT: Do you feel like you need to respond to any of that, Mr. Sykes?

MR. SYKES: No. Not really.

THE COURT: All right.

MR. SYKES: Could we approach the bench

briefly, though? I just want to make a comment off the record about this.

THE COURT: All right. I guess both of you can do that.

MR. SYKES: I might not have a chance later.

(Discussion off the record)

THE COURT: All right. The case is submitted and the Court is adjourned.

MR. SYKES: Thank you, Judge.

MS. WHITE: Thank you, Your Honor.

(Whereupon the proceedings were concluded.)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, REBECCA JANKE, do hereby certify that I am a Certified Court Reporter for the State of Utah;

That as such Reporter I attended the hearing of the foregoing matter on October 15, 2019, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting, and the foregoing pages numbered 1 through 47 constitute a full, true and correct record of the proceedings transcribed.

That I am not of kin to any of the parties and have no interest in the outcome of the matter;

And hereby set my hand and seal this 12th day of August, 2020.

_____

REBECCA JANKE, CSR, RPR, RMR